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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL - 7 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

Application by Ameritech Michigan)
For Authorization Under Section 271 of the)
Communications Act To Provide In-Region)
InterLATA Service in the State of Michigan)

CC Docket
No. 97-137

REPLY COMMENTS OF AT&T CORP. IN OPPOSITION TO
AMERITECH'S SECTION 271 APPLICATION FOR MICHIGAN

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**REPLY COMMENTS OF AT&T CORP. IN OPPOSITION TO
AMERITECH'S SECTION 271 APPLICATION FOR MICHIGAN**

AT&T Corp. ("AT&T") respectfully submits these reply comments regarding the application of Ameritech Michigan ("Ameritech") for authorization to provide interLATA services originating in Michigan.

INTRODUCTION AND SUMMARY OF ARGUMENT

The comments submitted by the United States Department of Justice (the "Department"), the Michigan Public Service Commission ("MPSC"), and numerous fledgling and potential local exchange competitors have overwhelmingly confirmed that the instant application is premature and should be denied. Ameritech has, once again, sought interLATA authorization under Section 271 before it has even arguably implemented many of its fundamental obligations to open the Michigan market to competition. For example, in addition to its failures to provide nondiscriminatory access to its operations support systems even for resale, Ameritech has steadfastly refused to provide such vital network elements as unbundled local switching and shared transport, despite clear orders from the MPSC and the Commission and despite the repeated requests of AT&T and other CLECs for these and other elements. That is why there are now no meaningful alternatives to Ameritech's local exchange services for nearly all business and residential consumers in Michigan.

AT&T's Reply Comments will be confined to two principal points. First, Part I discusses the MPSC's and the Department's showings that Ameritech has failed to provide critical checklist items. The MPSC correctly states there are three important checklist items -- shared transport, local switching, and OSS -- that Ameritech has failed to provide in accord with the Act and the Commission's rules,¹ and the Department's comments and AT&T's evidence provide detailed confirmation both of the MPSC's conclusions and of the full extent of Ameritech's current checklist shortcomings. AT&T and the Department's comments thus also rebut the suggestion -- made in a subsequent press release of one commissioner of the MPSC -- that Ameritech's noncompliance with the checklist is presumptively curable within 90 days. That is particularly so because the Department identifies a number of additional respects in which Ameritech has failed to comply with the checklist, and because AT&T's comments and affidavits have addressed several other aspects of checklist noncompliance that the Department has addressed only briefly or not at all, but that were erroneously evaluated by the MPSC.

Part II of this Reply then addresses the only comments that make any substantial attempt to defend Ameritech's application: the predictable filings of other RBOCS (Bell Atlantic, BellSouth and SBC). They repeat their now-familiar claims that Track A of § 271 requires only that a BOC offer to furnish each checklist item and not that the BOC actually provide them. They further contend that evidence that a RBOC is in fact failing to implement orders for specific items and to provide the nondiscriminatory access that § 271 requires is irrelevant to these proceedings so long as the BOC "commit[s]" to work with CLECs to address

¹ The MPSC also stated that Ameritech had not yet "shown the MPSC" that it was providing nondiscriminatory access to 911 service and related databases. MPSC Comments at 43-44.

implementation problems and the CLEC can take its complaints to an "appropriate forum." E.g. BellSouth/SBC Comments at 9-10.

As demonstrated below, these contentions are not merely legally wrong. They are astonishing. The Ameritech experience has vividly demonstrated that paper promises are meaningless, that there is a vast array of means through which a BOC can prevent competitive entry after it has made such promises, and that it is imperative that checklist items be irreversibly implemented on a nondiscriminatory basis before a BOC obtains long distance authority.

I. THE COMMENTS OF THE MICHIGAN PUBLIC SERVICE COMMISSION AND THE DEPARTMENT OF JUSTICE CONFIRM THAT AMERITECH IS NOT YET PROVIDING EACH ITEM OF THE COMPETITIVE CHECKLIST

The fundamental obligation of an RBOC that is seeking interLATA authority pursuant to Track A is to demonstrate that it "is providing" access and interconnection arrangements pursuant to rates, terms, and conditions that satisfy § 251(c), § 251(d), and the rest of § 271(c)(2)(B). As noted above, the Department of Justice has submitted a detailed evaluation that concludes that Ameritech is not yet providing many of the checklist items as required by law. In addition, the MPSC has also concluded, principally with respect to certain unbundled network elements, that Ameritech has not met its statutory obligations. As explained below, each of these findings confirm points that are made in detail in the affidavits submitted by AT&T.

In addition, the comments of the MPSC and the evaluation of the Department of Justice overlook other respects in which Ameritech failed to implement the checklist, and in some

instances the MPSC has erroneously concluded that Ameritech has met its checklist obligations. If left unacknowledged by the Commission and uncorrected by Ameritech, these failings will continue to delay if not foreclose the onset of competitively significant local entry in Michigan and foreclose the grant of any future application by Ameritech-Michigan for interLATA authority.

A. Ameritech Is Not Providing Nondiscriminatory Access To Unbundled Network Elements

1. Transport, Switching, And The Platform: AT&T's preferred entry strategy for Michigan -- of which it has repeatedly advised Ameritech -- is to offer customers service via a combination of network elements referred to as the platform. *Medlin Aff.* ¶ 8. Despite its unambiguous statutory and regulatory obligation to provide the platform, Ameritech has waged a war of procedural attrition to evade that obligation. Its chief -- but by no means sole -- weapons have been its refusal to acknowledge its obligation to provide unbundled shared transport and to permit the unbundled switch to be used to provide access services.

The MPSC's comments confirm that Ameritech is not providing unbundled shared transport to any CLEC today. MPSC Comments at 39. This is not for any lack of clarity regarding Ameritech's legal obligation to do so: "In spite of a MPSC order adopting the AT&T position on this matter, Ameritech has claimed that order was unclear." Id. The MPSC therefore suggests that a ruling from the Commission is now essential to resolve the dispute. Id.

The MPSC's comments also confirm that Ameritech has not yet provided unbundled switching to any CLEC. Id. at 40. For months, AT&T has sought to obtain unbundled local switching ("ULS") as part of the platform, but Ameritech to this day remains unable to provide

the platform to AT&T.² As the Department of Justice's evaluation sets forth, Ameritech has also imposed unlawful restrictions on CLECs' ability to use unbundled switching to offer access services. DOJ Evaluation at 16-19. The Department correctly notes that "Ameritech's restrictions . . . effectively deter the purchase of ULS" (*id.* at 18), thereby further delaying "an important mode of CLEC entry." *Id.* at 15.

Ameritech is also denying AT&T nondiscriminatory access to unbundled local switching in other important ways not mentioned by the Department or by the MPSC. Specifically, Ameritech (1) refuses to provide AT&T with customized routing to AT&T's operator services and directory assistance ("OS/DA") centers; (2) insists upon an ordering process for activating switch features that Ameritech has chosen not to use that imposes needless and anticompetitive delay; (3) seeks inappropriate recurring and non-recurring switch charges; and (4) has yet to provide AT&T with specifications that would permit AT&T electronically to order the platform, despite the Commission's unambiguous requirement that all "interface design specifications that the incumbent LEC will use to provide access to OSS functions" be established and made known to CLECs by January 1, 1997.³ *See* *Falcone/Sherry Aff.* ¶¶ 89-125, 82-86, 87-88; *Bryant Aff.* ¶¶ 25-32. This conduct, like the access-service restrictions noted by the Department, further serves to delay and deter meaningful competitive entry in Michigan.

Ameritech's noncompliance with its transport and switching obligations is not cured by its belated willingness to begin the process -- which should have started many months ago -- of designing and testing the UNE-platform. MPSC Comments at 40 (trial has not provided

² *See* *Falcone/Gerson Aff.* ¶¶ 15-19; *Medlin Aff.* ¶¶ 20-32; *Bryant Aff.* ¶¶ 33-57.

³ Second Order on Recons. ¶ 8 (CC Docket No. 96-98 (released Dec. 13, 1996)).

sufficient evidence to determine "if this requirements [sic] of the checklist can be satisfied"); see DOJ Evaluation at 20-21 (same). Indeed, a trial -- by its very nature -- cannot substitute for actual evidence of nondiscriminatory provision of the platform to CLEC customers. See Falcone/Gerson Aff. ¶¶ 20-34. As DOJ concluded, Ameritech has not demonstrated even that it has the "practical ability to provision the network platform" (DOJ Evaluation at 21 & n.31), and the severe restrictions that Ameritech seeks to impose on the trial further underscore how complicated Ameritech evidently believes provisioning the platform to be. Id. at 21.

Nevertheless, in a Press Release attributed to the MPSC and released June 10, 1997, the statement is made that "[T]he MPSC determined that Ameritech unconditionally met 11 items of the 14-item competitive checklist and could satisfy the requirements of the other three checklist items within the 90-day FCC review period." This statement, which is unsupported by anything in the written comments that the MPSC actually filed with the Commission, conflicts both with the procedural requirements that the Commission has established⁴ and with the extraordinary factual record of implementation delay to date. For example, given that, after more than a year of repeated requests for access to the platform, Ameritech has not yet agreed to a meaningful test of its ability to provide it, and is only now beginning to advance new technical obstacles (such as its insistence that CLECs include line class codes in their orders) that will compound the delay in implementation, the optimism expressed in the press release is entirely unfounded. See Falcone/Gerson Aff. ¶¶ 28-30, 34; Bryant Aff. ¶¶ 53-55. Indeed, not

⁴ See Procedures For Bell Operating Company Applications Under New Section 271 Of The Communications Act, Public Notice, No. 96-469 at 2 (Dec. 6, 1996) ("We expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon").

only is the "technical capability of Ameritech's systems" to provide the platform unproven (DOJ Evaluation at 21 n.31) but, as discussed below, AT&T's experience with Ameritech's provision of electronic OSS access for resale ordering demonstrates that it can take many months to move from designing a test of provisioning capabilities to actually receiving nondiscriminatory access.

2. **OSS:** Both the MPSC and the Department conclude that Ameritech has not yet demonstrated that it has provided CLECs with nondiscriminatory access to Ameritech's OSS. MPSC Comments 33-34; DOJ Evaluation 21-24, 38-40, & App. A. But the problem is not simply one of form but of substance. As the Department's Evaluation makes plain, the data that Ameritech and the CLECs have placed in this record clearly show that CLECs are not receiving nondiscriminatory access.

a. **Measuring Nondiscriminatory Access:** The MPSC devotes the largest portion of its comments to Ameritech's failure to demonstrate that CLECs are receiving nondiscriminatory access to Ameritech's OSS. MPSC Comments at 13-34. The MPSC identified 12 important problems with Ameritech's performance measures, and called for the "development of standards" that would "take account" of those problems so as to "permit determinations to be made regarding nondiscriminatory access to OSS and other unbundled network elements." MPSC Comments at 31-32, 33-34.

The bedrock measurement problem that the MPSC identified is the absence of data that would "permit direct comparisons to Ameritech's retail performance." MPSC Comments at 31; see DOJ Evaluation at 40. By failing to provide meaningful and consistent data on its own performance, Ameritech leaves third parties unable to compare the service CLECs receive to the

service Ameritech provides itself. See Pfau Aff. ¶¶ 15-23; Mickens Aff. Att. 23, 25 (proprietary).⁵

Compounding that problem is Ameritech's use of definitions and measurements that tend to disguise rather than illuminate aspects of performance that are crucial to any reasonable measurement of performance. For example, Ameritech has chosen to report its performance "within a target period of time" rather than by "determining actual average time to complete a task" (MPSC Comments p. 31; see DOJ Evaluation at 40; DOJ Evaluation App. at A-25), thereby avoiding any reporting upon the extent of delays beyond the target and precluding meaningful comparison with Ameritech's performance. Id.; see Pfau Aff. ¶¶ 17-21.

Similarly, "the lack of sufficient clarity" in Ameritech's definitions of terms (DOJ Evaluation p. 40) allows Ameritech to present reports that are at best useless and at worse misleading. For example, by defining a missed due date for resale migration of a residential POTS customer as an event in which Ameritech fails to provide service by the due date set by Ameritech, Ameritech disguises the fact that it often resets the due date long beyond the 24-hour interval it promised (and should easily be able to achieve) for orders involving a mere software change. See DOJ Evaluation App. A at A-12 to A-13. Ameritech's report therefore "obviously

⁵ The Department correctly notes that AT&T's Interconnection Agreement with Ameritech (the "Agreement") "calls for interconnection that is 'equal in quality' to that provided by Ameritech to itself, and defines 'equal in quality' to mean 'the same technical criteria and service standards' that Ameritech uses within its own network." DOJ Evaluation at 26 n.35 (citing Agreement § 3.6). The Agreement similarly calls for parity performance for access to and provision of Ameritech's network elements and resale services, and expressly reserves AT&T's right to insist upon parity performance as required by the Act. See, e.g., Agreement §§ 9.4, 9.10.7, 10.8., 10.9.7.

masks the very capacity problems" that the Commission and others "are attempting to assess." Id. at A-13; see Bryant Aff. ¶¶ 87-90 & Att. 23, 24.

b. **Operational Readiness:** Ameritech's failure to provide adequate performance measurements alone precludes any finding that Ameritech is providing nondiscriminatory access. See MPSC Comments at 33-34.⁶ But as the Department of Justice correctly observes, the facts and data in the record are sufficient to demonstrate that CLECs are not receiving anything like the equality of access that the Act requires. DOJ Evaluation at 21-24; DOJ Evaluation App. A at A-18, 23-24. This is true not only for residential resale orders, see id. at A-18, but for business resale (see Connolly Aff. ¶¶ 166-80) and for unbundled elements where, for example, Ameritech has yet even to provide AT&T with a complete set of specifications for ordering the UNE-platform. DOJ Evaluation App. A at A-21; see Bryant Aff. ¶¶ 33-57.

The Department correctly concludes that the heart of the resale ordering problem is Ameritech's deliberate refusal to automate much of the interaction between its gateway and its back-end legacy systems. DOJ Evaluation App. A at A-2 to A-3; see MPSC Comments at 24-

⁶ Although the Department separately discusses performance measures in emphasizing their importance to any finding that local markets are "irreversibly opened to competition" under the Department's public interest test, we do not understand the Department to suggest that performance measures sufficient to demonstrate nondiscriminatory access are not also a requirement of the competitive checklist. As the Department's Evaluation elsewhere makes clear, "[m]any of the checklist items expressly require 'nondiscriminatory' provision, and in addition the 'nondiscriminatory' terms and conditions required by Section 251 apply both to the LECs' treatment of other competitors and to the LECs' treatment of their own affiliates, so that the LECs must provide unbundled elements at the same level of quality as they do for themselves to the extent technically feasible." DOJ Evaluation at 7 n.3; see also MPSC Comments at 33 (checklist compliance requires proof that OSS access is "'at least equal in quality to that which the incumbent LEC provides to itself'" (quoting 47 C.F.R. § 51.311 (a) and (b))).

25. As a result, a high percentage of even the simple resale-migration and change orders that AT&T routinely submits, and that require no more than a software change on Ameritech's part, end up on the desks of Ameritech's resale customer service representatives for manual processing. E.g., Bryant Aff. ¶¶ 89, 132. The increased delay and risk of error inherent in manual processing has, in turn, precluded Ameritech from meeting even the standards of performance that it unilaterally offered to provide CLECs in its resale ordering guides. E.g., Id. ¶ 77.

For example, the Department correctly observes that Ameritech is able to claim that it meets the due date for provisioning CLEC orders over 97 percent of the time only because Ameritech unilaterally redefines the due date for a substantial percentage of orders that would otherwise be provisioned late. DOJ Evaluation App. A at A-13; see Bryant Aff. ¶¶ 76-90 & Att. 14-18, 21, 23, 24. The Department also correctly notes that Ameritech has been unable consistently to provide AT&T and other CLECs with timely Firm Order Confirmations or rejects ("FOCs" or "855s"), which "play a critical role in a CLEC's ability to keep its customer apprised of installation dates (or the changing thereof) and modify a customer's order prior to installation." DOJ Evaluation App. A at A-16 to A-18; see Bryant Aff. ¶¶ 106-116 & Att. 27. There also is no evidence that Ameritech has yet been able to generate accurate wholesale bills, or that it has resolved the problems that have led to many new CLEC customers being incorrectly billed by Ameritech as well as by CLECs. DOJ Evaluation at A-23 to A-24.

Perhaps most troubling, Ameritech's actual capacity to handle increased volumes of CLEC orders is much smaller than its stated capacity. As the Department states, Ameritech's reliance on manual processing to handle modest fluctuations in AT&T's order volumes (cf.

Bryant Aff. ¶ 93 & Att. 25) caused additional delay in processing not only AT&T's orders but those of other CLECs, and demonstrates "a need for additional improvement." DOJ Evaluation App. A-15 to A-16. Thus, until Ameritech automates the processing of orders between its gateway and its legacy systems, its reliance on manual processing will remain "the weakest link in the processing chain." Id. at 15.

These and other problems discussed by the Department and set forth in much greater detail in, inter alia, the affidavits of Susan Bryant and Timothy Connolly, demonstrate beyond dispute (1) that the problems that CLECs face in gaining nondiscriminatory access to Ameritech's OSS are not limited to Ameritech's failure correctly and fully to report its data; (2) that the problems have persisted for months; and (3) that accordingly there is no factual basis for assuming that Ameritech can or will correct these problems "within the 90-day FCC review period." MPSC Press Release at 1 (June 10, 1997). Indeed, although the Department suggests that "Ameritech has generally been forthcoming about early problems with its processes" (DOJ Evaluation App. at A-4), it has been AT&T's experience time and again that Ameritech has divulged vital internal information and acknowledged internal processing problems only when obligated to do so in state regulatory proceedings designed to evaluate compliance with Section 271. See Bryant Aff. ¶¶ 19-57, 119-21, 126-30, 199-213 & Att. 34-36; Connolly Aff. ¶¶ 107-112; 117-27; 139-69; 210-12. It therefore remains vitally important to keep the powerful incentive that Section 271 provides in place until Ameritech provides the Commission with stable and reliable evidence that CLECs are receiving nondiscriminatory access to Ameritech's OSS for serving business and residential customers through both resale and unbundled network elements.

B. The MPSC And The Department Erred In Not Identifying Additional Important Reasons For Denying Ameritech's Application.

Although the MPSC identified several fundamental defects in Ameritech's application, it erroneously concluded that Ameritech (1) has established rates for interconnection and access to unbundled network elements that comply with sections 271(c)(2)(B)(i) and 252(d)(1); (2) is providing interim number portability in accordance with the statute and the Commission's rules; and (3) is providing nondiscriminatory access to its poles, ducts, conduits and rights-of-way. Further, the MPSC did not address Ameritech's failure to prove compliance with the separate affiliate requirements of section 272, and erroneously concluded, as did the Department, that Ameritech has shown the presence of a predominantly facilities-based competitor.

1. **Pricing:** Incorporating by reference its February 5, 1997 Comments, the MPSC asserts that Ameritech is providing interconnection and access to unbundled network elements in accordance with the requirements of section 252(d)(1). MPSC Comments at 8, 11-12, 36 (June 9, 1997). By contrast, the Justice Department correctly concludes that "[f]or the most part Ameritech's prices in Michigan are still interim and have not been finally determined to be cost-based, though a proceeding to set final prices is already well underway and a decision could issue in the near future." DOJ Evaluation at 41 (emphasis added, footnote omitted). Indeed, there is no factual basis to support the MPSC's assertion that the interim rates are cost-based.

First, Ameritech made no effort to submit evidence with its Application to prove that the interim rates now in place in Michigan are based on forward-looking costs as required by Section 252(d)(1). In fact, the evidence that is in the record demonstrates that the interim rates

far exceed the cost-based rates mandated by section 252(d)(1). See Henson Aff. ¶¶ 17, 25-28; AT&T Comments at 28-29.⁷

Second, the MPSC's assertion that the MPSC has made a determination that the interim rates comply with Section 252 is not supported by and indeed directly contradicts what the MPSC actually said when it adopted those very interim rates. In the proceeding that established many interim rates, the MPSC first summarized the overwhelming evidence submitted not simply by AT&T but by the MPSC's own Staff and by the Michigan Attorney General and that demonstrated beyond question that Ameritech's cost studies were not prepared consistent with forward-looking cost principles. Order, Case Nos. U-11155/U-11156, at 4-7 (Mich. PSC Dec. 12, 1996), ("December 12 Order"); see Henson Aff. ¶ 23. Not only did the MPSC not dispute any of these criticisms, it expressly acknowledged that the cost studies on which the rates were based contained "flaws." December 12 Order at 7. The MPSC then adopted the interim rates proposed by Ameritech not because they were cost-based or in compliance with section 252(d)(1) -- there is no such finding anywhere in the December 12 Order -- but "to avoid further delaying

⁷ Although the Department notes that some of the interim rates are lower than the Commission's proxy prices (DOJ Evaluation at 41 n.58), there is both no state finding that these rates are cost-based (id. at 41) and substantial evidence that these rates nevertheless are substantially higher than could be supported by Ameritech's forward-looking costs. Henson Aff. ¶¶ 17, 25-26.

the extension of competitive options to customers in Ameritech Michigan's service territory."⁸
December 12 Order at 7.

The MPSC's assertion in its February comments that the interim rates comply with Section 252 thus conflicts with (1) its prior acknowledgement that the cost-studies are flawed; (2) its failure to defend the interim rates against the flaws identified by its Staff and others; (3) its contemporaneous decision to proceed with a hearing to set permanent rates that, unlike the interim rates, would comply with Section 252; and (4) the Department's assessment that no finding of cost-based rates has yet been made. In short, neither Ameritech nor the MPSC has provided any evidence to support their assertions that the interim rates are cost-based, and the evidence demonstrates convincingly that just the opposite is true.

2. Interim Number Portability: The MPSC also errs in concluding that Ameritech is in compliance with section 271(c)(2)(B)(xi), which requires a BOC to provide interim number portability ("INP") in "full compliance with [the Commission's] regulations." The Commission's rules plainly require Ameritech to provide INP through remote call forwarding, direct inward dialing, "or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier." 47 C.F.R. § 52.27 (emphasis added). While the Department does not address interim number portability, the MPSC acknowledges that AT&T has requested INP through route index-

⁸ In fact, it was not necessary to adopt Ameritech's flawed cost studies to avoid further delaying competition. In approving arbitrated rates between Ameritech and AT&T, the MPSC had previously recognized that studies similar to those adopted in the December 12 Order were inferior to the analysis submitted by AT&T. Order Approving Agreement Adopted By Arbitration, Case Nos. U-11151/U-11152, at 5-7 (Mich PSC Nov. 26, 1996); Henson Aff. ¶ 24. Nevertheless, in its December 12 Order, the MPSC, without explanation effectively overturned the superior rates set in arbitration. See Henson Aff. ¶¶ 17-19, 24.

portability hub ("RI-PH"), MPSC Comments at 48, yet fails to explain how Ameritech can meet its INP obligations while refusing outright to provide RI-PH.

To show that it has fully implemented this checklist requirement, Ameritech is plainly obligated to provide RI-PH, for there is overwhelming evidence that RI-PH is "technically feasible" and "comparable" to remote call forwarding and direct inward dialing. See Evans Aff. ¶¶ 48-53; AT&T Comments at 30. Far from providing RI-PH "as soon as reasonably possible," however, Ameritech first insisted that it be relegated to the BFR process. Then, without any finding that RI-PH was not technically feasible, Ameritech unilaterally terminated the BFR process, noting that it preferred to devote its resources to the development of permanent number portability. Evans Aff. ¶¶ 57-58 & Att. 9. RI-PH is vital to AT&T's ability to compete effectively for medium to large-sized business customers through AT&T's Digital Link service, which AT&T plans to offer to Michigan customers before Ameritech is scheduled to provide permanent number portability outside the Detroit MSA. Evans Aff. ¶¶ 23-46. By denying AT&T the use of RI-PH, Ameritech is hindering AT&T's ability to offer an innovative, facilities-based, and highly competitive alternative to business customers -- thus defeating a central purpose of Section 271 and of the Act.

3. **Structure Access:** The MPSC also maintains that Ameritech has satisfied its obligation to provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way (collectively "structure"), as required by section 271(c)(2)(B)(iii). Reasoning that AT&T currently provides local service through resale and therefore "should require no poles, ducts, or rights-of-way," the MPSC found that Ameritech meets the requirements of this checklist item solely through its provision of poles, ducts, and rights-of-way to Brooks. MPSC Comments at

35-36. The Department concluded, however, that it lacked "sufficient independent information" to determine whether it could endorse the MPSC's conclusion (DOJ Evaluation at 9-10 n.16), and the record in fact precludes any finding of full implementation at this time.

First, Ameritech's interconnection agreement with Brooks Fiber contains insufficient detail to determine whether Brooks has even been offered nondiscriminatory access to structure. See Lester Aff. ¶¶ 17-18. Second, Ameritech's refusal to implement with AT&T the basic structure-access obligations that are a precondition to an effective facilities-build plan and that AT&T has steadfastly sought to secure also precludes any finding of checklist compliance. Two days before filing its current Section 271 application, Ameritech delivered to AT&T a brand-new set of "Structure Access Guidelines" in which it refused to abide by terms and intervals to which it had previously assented. Lester Aff. ¶¶ 23-28. Further, these new "Structure Access Guidelines" differ in important ways from the Structure Access Guidelines that Ameritech has submitted with its Section 271 application. Lester Aff. ¶¶ 8, 28. In short, despite months of negotiation, there is considerable confusion over even what intervals Ameritech will commit to on paper for structure access, let alone any evidence that it is meeting its commitments.

4. Presence of a Predominantly Facilities-Based Competitor: Both the Department and the MPSC err in concluding that Ameritech has satisfied the requirement of section 271(c)(1)(A). Without addressing the question whether leased UNEs are "facilities" under section 271(c)(1)(A), the Department nonetheless concludes that because Brooks Fiber provides "significant" switching and transport and "a substantial share" of its own loops, Brooks is a predominantly facilities-based provider in Michigan. DOJ Evaluation at 6-7 & n.11. Because Brooks leases 69% of its Michigan access lines from Ameritech and "relies on Ameritech to

provide it with facilities for 61 % of its business customers and 90% of its residential customers" (Brooks Comments at 7, 9), this cannot, by definition, constitute "predominantly" facilities-based service. Further, the Department nowhere explains how Brooks, which even in its primary Grand Rapids market serves no more than 1.6% of the market, (Starkey Aff. ¶ 35), can be considered a "competing" provider of local exchange services in Michigan within the meaning of Section 271(c)(1)(A). See AT&T Comments at 32-34.

The MPSC's conclusion that Ameritech has met the requirements of section 271(c)(1)(A) assumes that the use of unbundled loops or ports constitutes facilities-based service. MPSC Comments at 11. This assumption conflicts, however, with the terms and purpose of section 271(c)(1)(A), which require the existence of at least one competitor with a network substantially independent of the BOC's. AT&T Comments at 35-36. Further, the Michigan PSC's reference to the facilities employed by TCG and MFS to serve business customers (MPSC Comments at 11) is unavailing, for these CLECs provide few access lines to business customers and no service whatsoever to residential customers, and thus cannot make up for the deficiencies in the Department's reliance upon Brooks Fiber.

5. **Section 272:** Finally, Ameritech's application is premature because it has not demonstrated compliance with section 272. As the Department recognizes, the lack of information regarding transactions between Ameritech and its affiliate ACI raises the question whether "Ameritech has sufficiently documented the affiliated transactions to allow detection of discrimination, cross-subsidization, or any other anticompetitive behavior." DOJ Evaluation at 28. This question must be answered in the negative. The transaction information Ameritech has disclosed is inadequate to support any finding that Ameritech will comply with section 272.

Goodrich/McClelland Aff. ¶¶ 34-45. For example, Ameritech has engaged in extensive support systems development and testing, without disclosing any transactions with ACI that concern OSS. Id. ¶ 25. If not in proceedings before the MPSC, then at least in its submission to this Commission, Ameritech should be required to disclose sufficient information concerning the operations of ACI and its relationship to Ameritech to permit a meaningful assessment of compliance with section 272.

II. THE RBOCS' ATTEMPT TO EVADE THE STATUTORY REQUIREMENT THAT RBOCS FULLY IMPLEMENT THE COMPETITIVE CHECKLIST SHOULD BE REJECTED

The central theme of the comments of Bell Atlantic and the joint comments of BellSouth and SBC is that RBOCs should be excused from demonstrating to the Commission that they have fully implemented the competitive checklist. The premise of this extraordinary argument is the legally erroneous claim that it is sufficient for purposes of Track A that a BOC merely "offer" to provide the various checklist items. But these RBOCs go further still, claiming that -- even where CLECs have requested checklist items that, even on the RBOCs' view of Track A, RBOCs are then obligated to provide -- the Commission should nevertheless disregard whether the BOC has "fully implemented" those checklist items and focus instead whether the BOC has expressed a "commitment to promptly resolve issues . . . as they arise.'" BellSouth/SBC Comments at 10 (citation omitted). Thus, in place of the "incentive for BOCs to cooperate with potential competitors" in implementing their interconnection agreements that Congress intended

to create with Track A,⁹ the RBOCs would relegate CLECs to "seek[ing] enforcement of the agreement in the appropriate forum." BellSouth/SBC Comments at 9.

The plain language, structure, and history of Section 271 foreclose these radical, monopoly-preserving proposals. Indeed, one need only look to Ameritech's demonstrated ability and repeated willingness indefinitely to delay implementing its checklist and other legal obligations to see the wisdom of this statutory scheme.

A. As Used In Section 271, "Provide" Means "Actually Furnish"

The RBOCs contend that, under Track A, "[a] Bell company does not have to be actually furnishing each item on the checklist" (Bell Atlantic Comments at 2) because "Congress required only that all checklist items be available." BellSouth/SBC Comments at 7. But the language, structure, and legislative history of Section 271 all say otherwise, and with good reason.

1. The RBOCs' conflation of "providing" and "offering" conflicts with the careful distinctions -- noted below¹⁰ -- that Section 271 draws between these terms. Congress's contrasting use of "provide" and "offer"/"make available" throughout Section 271 reflects the fundamental structural difference between Track A and Track B. Track A, the "primary entry

⁹ In the Matter of SBC Communications, Inc., FCC CC Docket No. 97-121, ¶ 46 (FCC 97-228, rel. June 26, 1997) (hereinafter "SBC Order").

¹⁰ The two subparagraphs of subsection (c)(1) establish two sets of requirements for interLATA authorization, one requiring proof that there are one or more unaffiliated, competing, facilities-based "providers" of service (subparagraph (A)), and the other requiring an approved or effective statement of "generally available" terms (subparagraph (B)). Subsection (c)(2) carries forward this distinction by distinguishing between the obligation of a BOC under subparagraph (1)(A) to be "providing" each element and the obligation under subparagraph (1)(B) to be "generally offering" each element. Finally, subsection (d)(3)(A) again preserves the distinction between the BOC's obligation to "provide[]" each checklist item "pursuant to subsection (c)(1)(A)" as opposed to its obligation to "generally offer[]" each item under "subsection (c)(1)(B)." § 271(d)(3)(A).

vehicle for BOC entry in section 271,"¹¹ cannot be met unless the BOC has "fully implemented" its checklist obligations. § 271(d)(3)(A)(i). It is plain as a linguistic matter that a BOC may not fairly claim to have "implemented" its obligation to provide all checklist items, let alone to have "fully implemented" that obligation, if it were not even furnishing some of those items to any CLECs.

Track B, by contrast, serves "as a limited exception" to Track A¹² that permits a BOC to seek interLATA authorization in the event that the BOC is unable, "through no fault of its own,"¹³ to meet the "is providing" standard of Track A. This could happen in any of three circumstances identified in subparagraph (c)(1)(B) -- i.e., if CLECs (1) fail to make a timely "request" for an access and interconnection agreement; (2) having made requests for an access and interconnection agreement, then "fail[] to negotiate in good faith"; or (3) having negotiated an agreement, then "fail[] to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." § 271(c)(1)(B).

The need for these alternatives to Track A simply disappears if the term "provide" is interpreted to mean "offer" or "make available." For example, there would be no need for the two subsections of subparagraph (B), because the issues of whether the CLEC had negotiated for various items in good faith or implemented its agreement within a reasonable period of time would not affect the BOC's ability to meet Track A. The fact that the BOC had "offered" to provide the items, by hypothesis, would be sufficient to demonstrate compliance under Track

¹¹ SBC Order ¶ 41.

¹² SBC Order ¶ 46.

¹³ SBC Order ¶ 55.

A regardless of a CLEC's performance. Indeed, there would have been no need at all for a Track B separate from Track A. Congress would have simply required BOCs to offer the checklist items via an SGAT for purposes of Track A, rather than require full implementation of interconnection agreements.

It is "elementary" that statutes may not be interpreted in ways that "render one part inoperative." Colautti v. Franklin, 439 U.S. 379, 392 (1979); see, e.g., Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 100 (1992); United States v. Menasche, 348 U.S. 528, 538-39 (1955). Like SBC's erroneous construction of what constitutes a "qualifying request" for Track A, SBC's conflation here of "provide" and "offer" "effectively reads the exceptions in section 271(c)(1)(B) out of the statute." SBC Order ¶ 37. That alone forecloses such an approach. See id.

2. That the term "providing" should be given its natural meaning of "supply" or "furnish"¹⁴ is further made clear by legislative history of Section 271. Cf. Bell Atlantic Comments at 5-6.

The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist . . . the explicit

¹⁴ See Webster's Seventh New Collegiate Dictionary (G. & C. Merriam Co. 1963) ("to supply what is needed for sustenance or support; to procure in advance; to supply for use"); Black's Law Dictionary (6th ed. 1990) (to "make, procure, or furnish for future use, prepare"; "[t]o supply; to afford; to contribute"); see also United States v. Cruz, 729 F. Supp. 94, 95 (S.D. Fla. 1989) (holding that a defendant has not "provided" substantial assistance if the Government in good faith refuses a defendant's offer); Utah v. Souza, 846 P.2d 1313, 1317 (Utah Ct. App. 1993) (holding that, "definitionally, 'provide' appears substantially equivalent to 'furnish or supply'"); cf. Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1118 (10th Cir. 1977) (employer held to have "provided" a ladder by actually delivering it to the work site in a manner such that employees could use it in performing their jobs).

factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the "checklist" under new section 271(c)(2).

H.R. Rep. No. 104-458, at 148 (1996) (emphasis added). Only if a checklist item actually has been furnished to an operational competitor will it be possible for the Commission to make "the explicit factual determination" that the "BOC has fully implemented" its checklist responsibilities. Id.

3. The RBOCs' policy arguments for equating "provide" and "offer" also lack merit. First, the BellSouth/SBC contention (Comments at 5) that "neither Ameritech, nor any regulator, has control over" whether CLECs order particular checklist items is simply false. Ameritech has demonstrated its control over CLEC ordering by refusing to offer such checklist items as unbundled switching and transport in conformance with the Act. See AT&T Comments at 9-20; DOJ Evaluation at 10-19; MPSC Comments at 39-40. The predictable result, as the Department has observed, has been to "deter" CLEC usage of those items. DOJ Evaluation at 18. To relieve RBOCs from having actually to provide checklist items that Congress knew would be vital for the development of meaningful local competition would simply reward those RBOCs whose own recalcitrance and defiance of their legal obligations most successfully deterred competitive entry.

Second, there is also no factual basis for Bell Atlantic's related concern that requiring a BOC actually to provide each checklist item "would render the Bell companies . . . hostage to the strategic purchasing decisions of local competitors." Bell Atlantic Comments at 5. In Michigan, as in the nation as a whole, multiple CLECs are aggressively pursuing all the items